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CASE NO. _____

Supreme Court, U.S.
FILED
FEB 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GISSENDANER MORTGAGE COMPANY, J. C. GISSENDANER, JACKSON M. GISSENDANER, AND JOE C. GISSENDANER,

Petitioners,

vs.

CENTRAL BANK OF THE SOUTH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

HAL A. DAVIS
7 W. Washington Street
Quincy, Florida 32351

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I

Whether the Petitioners were denied due process of law and equal protection of the laws of Florida requiring a jury trial, by entry of a summary judgment awarding a deficiency judgment which could not have been legally entered had petitioners been accorded the benefit of a legal presumption that, upon a failure to prove sale of collateral in a commercially reasonable manner, it is presumed that the collateral was worth the amount of the debt at the time of repossession.

II

Whether an Alabama money judgment which included an award of 15% of the collected amount as a reasonable attorney's fee, unsupported by evidence, should have been denied full faith and credit in Florida where the contract for fees provided only for a reasonable fee not exceeding 15% of the amount collected.

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The (R____) references are in conformity with the designations in the Florida Appellate Court except that petitions for rehearing and orders denying them are kept without such designations in the Appellate Court with the record on appeal returned to the trial court.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

There are no judicial opinions or findings of fact in any of the prior State Court proceedings in this case except for the order of the first trial judge where in denying the first motion for summary judgment he found there were issues to be tried. (R 44)

The order affirming the trial court's entry of judgment, Per Curiam, is reported as Gissendaner Mortgage Company v. Central Bank of the South, 495 So2d 751 (Fla. DCA, 1986).

JURISDICTIONAL STATEMENT

The Judgment sought to be reviewed was dated and entered on October 3, 1986, (A 3) a Motion for Rehearing and Motion for Rehearing en banc was filed on the 20th of October, 1986, and denied on the 18th of November, 1986 (A 4). An amended Motion for Rehearing en banc was filed on the 14th day of November, 1986 and was denied on the 28th of November, 1986 (A 5).

The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Article XIV, Section 1 (Fourteenth Amendment)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of Florida

"Trial by jury. - The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law. Art. I, §22, Fla.Const.

Alabama Statutes

"(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor..." Uniform Commercial Code, Section 7-9-504

STATEMENT OF THE CASE

The Petitioners' (Gissendaners) Statement of the Case will begin with the filing of the Complaint in Florida relating such prior facts of record as are applicable to the Florida proceedings. The Respondent Bank will be referred to as "the Bank".

The Gissendaners were in the business of dealing in real estate mortgages and held a substantial number of them encumbering real property in the State of Florida.

Needing money, the Gissendaners went to nearby Dothan, Alabama and borrowed $140,000.00 from the Bank upon a promissory note secured by the real estate mortgages (R 6) which were thereafter in possession of the Bank but the Gissendaners continued collecting the mortgage payments.

After a time the Gissendaners fell in arrears on the payments due on the promissory note held by the Bank and the Bank declared a default, accelerated the debt, and began collecting the mortgage payments. (R 66-68, 99).

While still holding the mortgages the Bank brought suit in Alabama upon the accelerated debt and obtained a judgment which included an attorney's fee of 15% upon the entire amount claimed. (R 33-35)

The attorney's fee was provided for in the promissory note as a reasonable fee not to exceed 15%. No evidence of what fee would be reasonable was ever presented but the trial court assessed the 15% based upon a Bank officer's testimony that the Bank usually paid their attorneys a 15% collection fee. (R 15)

Without crediting the collected mortgage payments the Bank brought an action in Florida State Court seeking full faith and credit for the judgment in the full amount. (A 6-10; R 1-2)

On the 30th day of March, 1983, the Bank filed suit in Circuit Court in Gadsden County, Florida, (A 6-10; R 1-2) seeking full faith and credit on an Alabama judgment for $158,076.74.

The Gissendaners filed an answer, defenses and counterclaim on the 25th of April, 1983, admitting the entry of the Alabama judgment but denying that no part of it had been paid and affirmatively alleging the conversion of certain notes and mortgages of the Defendants and an unconscionable attorney's fee award. (R 3-7) The Counterclaim alleged conversion of mortgages worth $140,998.44. (R 4-7)

The Gissendaners filed an amended answer, defenses and counterclaim on the 17th day of June, 1983, denying for lack of knowledge the allegations of paragraph 1 of the Complaint which asserted entry of a valid Alabama judgment. (A 11-19; R 11-16) This pleading also added a third affirmative defense of set off and a second count of the counterclaim alleging slander of title to the mortgages. A jury trial was demanded.

On February 15th, 1984, the Bank filed it's answer to the affirmative defenses and counterclaim. (R 17) On the 29th of February, 1984, an order was entered by the Honorable Ben C. Willis denying the Bank's motions to strike the Gissendaner's first and third affirmative defense and to dismiss count one of the counterclaim. (R 18)

That order granted the Bank's motions to strike the Gissendaner's second affirmative defense, with leave to amend, and the motion for more definite statement. (R 18)

On March 14th, 1984, the Gissendaners filed a more definite statement, as ordered, and alleged that the Bank contacted the Mortgagors of the assigned mortgages claiming full ownership therein and alleging that the value of the mortgages exceeded the debt to the Bank. (R 19)

Also, on the 14th of March, 1984, the Gissendaners filed a second amended answer, defenses and counterclaim alleging that the portion of the judgment consisting of attorney's fees should not be enforced because the fees were awarded in violation of due process of law. (A 2-21; R 20)

On the 20th of March, 1984, the Bank moved to strike and to dismiss; the motion to strike being aimed at the second affirmative defense and the motion to dismiss being directed at count two of the counterclaim. (R 21-22)

On April 11, 1984, the Bank filed two affidavits, one by John C. Stack, a vice-president of the Bank, and one by the presiding Circuit Judge, Jerry M. White, who had entered the judgment in Alabama for which full faith and credit was sought in this case. (R 23-39)

The Bank also filed a motion for summary judgment on the 11th day of April, 1984 which was apparently to be supported by the above mentioned affidavits, although the motion does not refer to them. (R 40-41).

On June 15th, 1984, the Gissendaners filed an affidavit of Joe C. Gissendaner in opposition to the motion for summary judgment, stating that although the Bank held the mortgages as collateral they never credited their value or payments thereon as evidenced by the Alabama judgment which was for the full amount of the debt alleged to be due by the Bank. (R 42-43)

The summary judgment effort was denied by order of then presiding Judge Ben C. Willis, on July 13th, 1984, because there were issues to be tried. (R 44)

Then, on January 30th, 1985, the Bank filed still another motion for summary judgment. This time, in addition to an affidavit of John Stack concerning his efforts to dispose of the collateral, the motion sought support from the depositions of John C. Stack and J.C. Gissen-

daner taken November 14, 1984 (R 46-125).

This motion was granted by order filed on the 18th of July, 1985, by the Honorable Charles E. Miner, Jr., the Judge replacing Judge Willis in the case. (R 126)

On July 24th, 1985, the Gissendaners filed a motion for rehearing (R 127-128) but before any action on that motion could be heard, a final judgment was entered without notice to the Gissendaners showing the date of signing as July 23, 1985 and a filing date of July 26, 1985. (R 129)

On July 29th, 1985, the Gissendaners filed a second motion for rehearing directed at the final judgment with attachments of the Bank's motion for summary judgment, and the Gissendaners' first motion for rehearing.

This last motion was denied on October 16, 1985 by order of the Honorable Charles E. Miner. (R 135)

Notice of Appeal to the District Court of Appeal of Florida, First District, was filed on the 18th day of October, 1985 (R 136) and, after briefs were filed by both parties, that Court entered an order affirming Per Curiam the final deficiency judgment. (A 3)

The Gissendaners filed a motion for rehearing and motion for rehearing en banc on the 20th day of October, 1986, which was denied on the 18th day of November, 1986. (A 4) Then on the 14th day of November, 1986, an amended motion for rehearing and motion for rehearing en banc was filed(A 24)and denied the 26th day of November, 1986. (A 5) On that date, the judgment of the Appellate Court became final for the purpose of computing time for review in this Court.

REASONS FOR GRANTING THE WRIT

THE PETITIONERS WERE DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW WHEN, AFTER THE BANK FAILED TO PROVE A COMMERCIALLY REASONABLE SALE OF COLLATERAL, THE APPELLATE COURT REFUSED TO ACCORD THEM A LEGAL PRESUMPTION THAT WOULD HAVE REQUIRED A JURY TRIAL

The case for which review is sought began as a suit in the Florida trial court seeking full faith and credit for an Alabama judgment. It became a suit for a deficiency judgment after a sale of the collateral failed to produce a sum equal to the amount of the judgment debt.

The sale of the security was after the entry of judgment in Alabama. The security was never mentioned in the Alabama action nor in the Florida proceedings, until the sale was "smoked out" by appropriate pleadings. (A 20-26; R 11-16)

While a creditor has cumulative remedies under the Uniform Commercial Code of both Florida and Alabama, the use of any one of which does not bar resort to the other, due process requires that the selection of a particular remedy does require fair dealing to the extent that such selected remedy should be pursued to its ultimate procedural fruition before undertaking another available remedy.

Here, due process of law was oppressively abused by the creditor in that, while holding the mortgages after repossession and collecting the payments due thereon, it undertook a suit and obtained a judgment upon the full amount of the debt without crediting any received payments on the mortgages and obtained a 15% attorney's fee award based upon that full amount.

As necessarily applied by the Florida trial court and affirmed by the appellate court,the Uniform Commercial Code of Florida operated to deny the Appellants due process of the law and equal protection of the law by failing to procedurally apply a presumption accorded others in equal circumstances which further operated to deny them a trial by jury also accorded others in equal circumstances.

The Gissendaners were entitled to trial by jury on the issues so triable. Article I, Section 22 of the Constitution of the State of Florida.

A necessary element of an action seeking a deficiency, because the collateral sells for less than the amount of the debt, is proof of a commercially reasonable sale of the collateral. Applestein v. National Bank of Tulsa, 358 So 2d 106 (Fla. 3rd DCA May 2, 1978)

There, the Court specifically held:

> "the sale, if it is to produce a deficiency, is an element of the action that must be proved without genuine issue, if a summary final judgment is to be entered. Cf. Pompano Paint Co. v. Pompano Beach Bank and Trust Company, 208 So 2d 152 543 (Fla. 4th DCA 1976)."

In this regard the Bank failed to prove a commercially reasonable sale of the mortgages because:

(1) There was no showing of whether or not a recognized market existed;

(2) Even if a recognized market had been shown, no market price was proved;

(3) The time of repossession was never established, and;

(4) The sale was not carried out in conformance with the Notice of Sale as required by Alabama law. First Alabama Bank v. Parsons, 390 So 2d 640 (Ala. 1980)

On this point, the Bank, after some lazy sale efforts, sent a letter to the Gissendaners' attorney advising that it intended to conclude a sale of the collateral prior to October 1, 1983, and that if they could find a better purchaser they must notify the Bank prior to September 27, 1983. (A 22-23; R 56)

This could not have been "reasonable notice" since the Bank's vice president, Stack, swore in his Affidavit in Support of Summary Judgment (to which the referred to letter was an exhibit) that the sale was in fact concluded much later, to wit; October 26, 1983. (R 50)

There is nothing to show that the Gissendaner's were advised of this

later sale date and therefore summary judgment was never, at any stage, appropriate since a commercially reasonable sale was never shown.

The Florida Supreme Court has established concisely the burden of opposing parties where summary judgment is sought to surplant the right to a jury trial. In Holl v. Talcott, 191 So 2d 40, it held:

> "This means that before it becomes necessary to determine the legal sufficiency of the affidavits or other evidence submitted by the party moved against, it must first be determined that the movant has successfully met his burden of proving a negative, i.e., material fact.
>
> He must prove this negative conclusively. The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party."
>
> (Emphasis supplied)

The question before this Court is widespread in commercial transactions throughout the nation. It involves the requirements of a reasonably commercial sale of secured property upon default and, ancillary thereto, the remedies applicable to a commercially unreasonable sale.

Petitioners submitted a Notice of Additional Authorities to the Florida Appellate Court dated the 13th day of May, 1986, containing a case in which the Eleventh Circuit Court of Appeals affirmed an order of the United States District Court, Middle District of Florida, holding that a commercially unreasonable sale barred a deficiency judgment for the amount of the debt remaining unsatisfied after a commercially unreasonable sale. That ruling was based upon an assessment of the holdings of the various District Courts of Appeal in Florida. See Peoples Bank of Polk County v. Roberts, 779 F2d 1544.

The Florida Supreme Court has settled that question differently from the Federal Court.

In Weimer v. American Petrofina Marketing, Inc., 482 So 2d 1362 (Fla. 1986) that court held that a commercially unreasonable sale did not bar a deficiency. It did however, lay down the burdens upon the respective parties in a suit for deficiency judgment:

> "However, the secured party's failure to dispose of the collateral in a commercially reasonable manner should not impose a burden on the debtor to prove damages."
>
> "We therefore hold that when it has been determined that a secured party has disposed of collateral in a commercially unreasonable manner, there will arise a presumption that the fair market value of the collateral at the time of repossession was equal to the amount of the total debt that it secured. The burden to prove that the fair market value of the collateral was less than the debt will be upon the secured party."
>
> (Emphasis supplied)

Thus, the District Court of Appeal of Florida, First District, was aware of this presumption. Had it applied it a reversal would have been required with directions to the trial court to order a trial by jury under appropriate instructions to the jury to consider the presumption.

THE ALABAMA AWARD OF ATTORNEY'S FEES VIOLATED DUE PROCESS AND THEREFORE WAS NOT ENTITLED TO FULL FAITH AND CREDIT IN FLORIDA

In this case, the Gissendaners raised the unconscionableness of the attorney's fees and that they were awarded in denial of due process of law in their answer and defenses in the Florida suit for deficiency.

The only probative material in support of the attorney's fees awarded in Alabama was the sworn statement of John Stack, the Bank's vice president, that:

> "It is our standard practice to allow our attorneys 15% of the collection."(R 6)

This statement is not probative of a reasonable fee in the case in Alabama.

Since the United States Supreme Court decided Alyeska Pipeline Service Company v. The Wilderness Society, 421 U.S. 420, 44 L Ed 2d 141, 95 S Ct, 1612,

it is clear that attorney's fee awards must be supported by contract, statute or other legal foundation. Here, petitioners contracted to pay a reasonable fee not to exceed 15% of the amount collected; they did not contract to pay what the Bank usually paid it's attorneys.

It goes without necessity of citation that such awards must be supported in the evidence...lacking here. In 1980 this Court also held that a judgment rendered in violation of due process is void in the rendering state and not entitled to full faith and credit. Worldwide Volkswagen Corp. v. Woodson. 444 US 286, 62 L Ed 2d 490, 100 S. Ct. 559

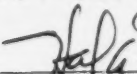
The attorney's fee included in the Alabama judgment, not being based on the contract, is not entitled to full faith and credit.

The State Appellate Court has necessarily rendered a decision which has sanctioned a departure so far from the accepted and usual course of judicial proceedings by refusing to reverse the judgment of the trial court entered upon a summary judgment as to deprive the Gissendaners of due process and equal protection of the law.

A substantial and important federal question being involved, the decision on review should be reversed and remanded with directions for the District Court of Appeal of Florida, First District, to require a new trial consistant with due process and equal protection of the law as mandated by the Constitution of the United States.

Respectfully submitted,

HAL A. DAVIS
7 W. Washingtin Street
Quincy, Florida 32351
904-627-7587



Attorney for Petitioner

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IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL
CIRCUIT, IN AND FOR
GADSDEN COUNTY, FLORIDA.

CENTRAL BANK OF THE SOUTH,
A National Banking Association,

Plaintiff,

vs. CASE NO.: 83-275-CA

GISSENDANER MORTGAGE COMPANY,
et al.,

Defendants.

JUDGMENT

The above entitled action having come before the Court on Motion For Summary Judgment by the Plaintiff and the Court by order of July 17, 1985, having entered its Order granting summary judgment in favor of the Plaintiff and against the Defendants,

It is ORDERED and ADJUDGED that Plaintiff, Central Bank of the South, shall have and recover from Defendants, J.C. Gissendaner, Jackson M. Gissendaner and Joe C. Gissendaner, individually, and d/b/a Gissendaner Mortgage Company, the following:

The sum of $58,496.98 principal, $12,095.67 for interest at the rate of 12%, with costs in the sum of $77.00, making a total of $70,592.65, plus interest at a legal rate from the date of the entry of this judgment for which let execution issue.

DONE and ORDERED this 23rd day of July, 1985.

S/ Charles E. Miner, Jr.
Charles E. Miner, Jr.
Circuit Judge

Copy to:

Stephen T. Etheredge, Esquire
P.O. Box 1193
Dothan, Alabama 36302

Hal A. Davis, Esquire
7 W. Washington Street
Quincy, Florida 32351

IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

GISSENDANER MORTGAGE COMPANY, a partnership, JOE C. GISSENDANER, J.C. GISSENDANER and JACKSON M. GISSENDANER, Individually, and as members of the partnership,

Appellants,

vs.

CENTRAL BANK OF THE SOUTH, A National Banking Association,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED

CASE NO.: BJ-171

Opinion filed October 3, 1986

An Appeal from the Circuit Court for Gadsden County. Charles E. Miner, Jr., Judge.

Hal A. Davis, Quincy, for Appellants.

Stephen T. Etheredge of Jackson Huskey, Hornsby and Etheredge, Dothan, Alabama, for Appellee.

PER CURIAM.

AFFIRMED.

ERVIN, WIGGINTON & BARFIELD, JJ., CONCUR.

DISTRICT COURT OF APPEAL,
FIRST DISTRICT

Tallahassee, Florida 32301
Telephone No. (904)488-6152

DATE: NOVEMBER 18, 1986

CASE NO.: BJ-171

GISSENDANER MORTGAGE CO. vs. CENTRAL BANK OF THE SOUTH

Appellant/Petitioner

Appellee/Respondent

ORDER

Motion for rehearing and motion for rehearing en banc are DENIED.

By Order of the Court

(SEAL)

RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Hal A. Davis, Esquire, Quincy, Florida; Stephen T. Etheredge, Esquire, Dothan, Alabama.

S/ Karen Roberts
Deputy Clerk

DISTRICT COURT OF APPEAL,
FIRST DISTRICT

Tallahassee, Florida 32301
Telephone No.(904)488-6152

DATE: NOVEMBER 26, 1986

CASE NO.: BJ-171

GISSENDANER MORTGAGE CO.	vs.	CENTRAL BANK OF THE SOUTH
Appellant/Petitioner		Appellee/ Respondent

ORDER

Amended motion for rehearing and motion for rehearing en banc is DENIED.

By Order of the Court

(SEAL)

RAYMOND E. RHODES,
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Hal A. Davis, Esquire, Quincy, Florida;
Stephen T. Etheredge, Esquire, Dothan, Alabama.

S/ Karen Roberts
Deputy Clerk

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY
FLORIDA

CENTRAL BANK OF THE SOUTH,
A National Banking Association,

Plaintiff,

vs.

CIVIL ACTION NO.:
85-275-CA

GISSENDANER MORTGAGE COMPANY, a Partnership comprised of J.C. GISSENDANER, JACKSON M. GISSENDANER, AND JOE C. GISSENDANER, AND J.C. GISSENDANER, Individually, and JACKSON M. GISSENDANER, Individually, AND JOE C. GISSENDANER, Individually,

Defendant.

COMPLAINT

Comes now the Plaintiff in the above-styled action and states its complaint as follows:

1. On the 17th day of March, 1983, in an action in the Circuit Court of Houston County, Alabama, Civil Action No.: CV-82-507-W, wherein Central Bank of the South, a National Banking Association, was Plaintiff,

and Gissendaner Mortgage Company, a partnership comprised of J.C. Gissendaner, Joe C. Gissendaner, Jackson M. Gissendaner, and J.C. Gissendaner, individually, Joe C. Gissendaner, Individually, and Jackson M. Gissendaner, Individually, were Defendants, judgment was duly entered in favor of the Plaintiff and against the Defendants for the sum of $158,076.74, and the further sum of $42.00 as court costs, a copy of which is attached hereto as Exhibit "A".

2. No part of said judgment has been paid.

3. WHEREFORE, Plaintiff demands judgment against the Defendants in the sum of One Hundred Fifty-Eight Thousand Seventy Six and 74/100 Dollars ($158,076.74), interest and costs.

JOHNSON, HUSKEY, HORNSBY
& ETHEREDGE

BY S/Stephen T. Etheredge

Stephen T. Etheredge
Attorney for Plaintiff
PO . Box 1193
Dothan, Alabama 36302

Florida Bar No. 213683

CERTIFICATE OF JUDGMENT

THE STATE OF ALABAMA/ Circuit COURT
/
Houston COUNTY /NO.CV 82-507-W
/
/March Term 1983

I, Julia L. Trant Clerk of the CircuitCourt for said County and State hereby certify that on the 17th day of March, 1983 CENTRAL BANK OF THE SOUTH, A National Banking Association, Plaintiff recovered of GISSENDANER MORTGAGE COMPANY, A Partnership comprised of J.C. GISSENDANER, JACKSON M. GISSENDANER, and JOE C. GISSENDANER, and J.C. GISSENDANER, Individually, Jackson M. Gissendaner, Individually, and Joe C. Gissendaner, Individually, Defendants in the Circuit Court of said County a judgment.

for the sum of One Hundred Fifty Eight Thousand Seventy Six and 74/100

Exhibit "A"

($158,076.74) Dollars and the further sum of Forty Two and No/100 ($42.00) Dollars cost of suit, and that Dow T. Huskey is Plaintiff's Attorney of record.

Given under my hand, this 17th day of March, 1983.

S/ Julia L. Trant CLERK

I hereby further certify that said _____ was, on the _____ day of _____ 19__ transferred to _____ as shown by record in my office.

_____ CLERK

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR GADSDEN COUNTY, FLORIDA.

CASE NO.: 83-275-CA

CENTRAL BANK OF THE SOUTH,
A National Banking Association,

Plaintiff,

vs.

GISSENDANER MORTGAGE COMPANY,
et al.,

Defendants.

AMENDED ANSWER, DEFENSES AND COUNTERCLAIM

For answer to the complaint the defendants state:

1. Paragraph 1 of the complaint is admitted except that it is denied for lack of knowledge that the alleged judgment was duly entered.

2. Paragraph 2 of the Complaint is denied.

FIRST AFFIRMATIVE DEFENSE

BEFORE commencement of this action Plaintiff converted to its own

use notes and mortgages belonging to Defendant J.C. GISSENDANER, having a value of $140,988.44. A copy of trial balance sheet having to do with these notes and mortgages is attached hereto and by these references made a part hereof and marked Defendant's exhibit "A".*

SECOND AFFIRMATIVE DEFENSE

THAT the Alabama judgment that is the basis of this action was obtained upon motion of Plaintiff for summary judgment and the amounts contained in said judgment were based upon affidavit of JOHN STACK filed in said cause, a copy being attached as Defendant's exhibit "B". That as reflected in said affidavit and judgment sued upon, an attorney's fee of 15% was allowed. That for this Court to allow such a fee when the action was terminated upon entry of summary judgment would be inequitable and unjust.

The affidavit in support (exhibit "B") relates only to the note sued upon whereas the judgment includes 15% attorney's fees against all defendants.

There being no separation of the judgments as to each defendant or designation of costs and attorney's fees the judgment becomes unenforceable as a matter of due process because there can be no valid judgment for attorney's fees under the guaranty agreement.

THIRD AFFIRMATIVE DEFENSE

The Plaintiff holds certain mortgages belonging to GISSENDANER MORTGAGE COMPANY and is collecting the payments due thereof for which the Defendants are due set off.

COUNTERCLAIM

Counter-Plaintiff, J.C. GISSENDANER d/b/a GISSENDANER MORTGAGE COMPANY, sues Counter-Defendant CENTRAL BANK OF THE SOUTH and alleges:

COUNT ONE

1. This is an action for damages that exceed $5,000.00.

2. On or about March 18, 1983, after entry of the judgment Plaintiff/Counter Defendant sues upon, it illegally converted to it's own use notes and mortgages which are the property of the Counter-Plaintiff of the value of $140,998.44. A copy of the trial balance sheet having to do with these notes and mortgages is attached hereto and by this reference made a part hereof and marked Counter-Plaintiff's Exhibit "A".*

3. The Counter-Defendant in its Complaint herein claims no part of the judgment has been paid when in fact it has collected monies due to Counter-Plaintiff under the notes and mortgages under claim of owning the same.

4. As a direct and proximate cause of the above described malicious

acts of the Counter-Defendant the Counter-Plaintiff has suffered damages to its credit in addition to the loss of payments due and paid on the notes and mortgage and the loss of use of the notes and mortgages as assets.

Wherefore Counter-Plaintiff demands judgment against Counter-Defendant for damages both actual and punitive, costs, attorney's fees and trial by jury.

COUNT TWO

5. Counter-Plaintiff re-alleges paragraphs 1, 2, and 3 of Count One.

6. The Counter-Defendant has slandered the title to Counter-Plaintiff's title to the above mentioned notes and mortgages knowing it had already obtained a judgment for all amounts due it from Counter-Plaintiff.

7. As a direct and proximate cause of the above described actions of

the Counter-Defendant, the Counter-Plaintiff has suffered damages to his credit reputation and title to his property.

Wherefore Counter-Plaintiff demands, both actual and punitive, costs, attorney's fees and trial by jury.

S/ Hal A. Davis
HAL A. DAVIS
7 W. Washingtin Street
Quincy, Florida 32351
904-627-7587

Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by United States mail to Mr. STEPHEN T. ETHEREDGE, Attorney for Plaintiff, Post Office Box 1193, Dothan, Alabama 36302, this 8th day of June, 1983.

S/ Hal A. Davis

*Counter-Plaintiff's exhibit "a" has been omitted.

CENTRAL BANK OF THE SOUTH,	*	IN THE CIRCUIT COURT OF HOUSTON
	*	COUNTY, ALABAMA
Plaintiff	*	CIVIL ACTION #
vs.	*	CV-82-507W
GISSENDANER MORTGAGE CO., et al,	*	
Defendant	*	

AFFIDAVIT

Before me, the undersigned, a Notary Public, personally appeared John Stack, who, being known to me, and being by me first duly sworn, deposes and says as follows:

> My name is John Stack. I am Vice-President of Central Bank of the South, Dothan, Alabama. In such capacity, I have personal knowledge of the loan of Defendants with Central Bank of the South. Prior to making this Affidavit I have thoroughly reviewed the loan file again to insure its accuracy as much as possible.
>
> The Defendants executed a Note to Central Bank of the South on September 17, 1981, in the principal sum of $140,000.00. The interest on this loan was at a rate equal to one pereen above the prime

lending rate. This note was due on September 17, 1982. Credit has been given for all payments of principal and interest made by or on behalf of the Defendant. The current principal amount due and owing through March 16, 1983, is $129,098.58; the current interest due and owing through March 16, 1983, is $8,359.46. The interest on the principal balance of this loan is accruing at a daily accrual rate of $42.44. The total principal and interest due on this note as of March 16, 1983 is $137,458.04.

As shown by the note signed by the Defendants, on file in this proceeding, the Defendants agreed to pay a reasonable attorneys fee not to exceed 15% of the amount collected in the event this note was placed in our attorneys hands for collection. It is our standard practice to allow our attorneys 15% of the collection. 15% of the principal balance with accrued interest to date amounts to $20,618.71. This would make the total of principal, interest and attorneys fee due, after all credits, $158,076.74.

S/ John Stack
JOHN STACK

SWORN to and SUBSCRIBED before me this 16th day of March, 1983.

S/ Stephen T. Etheredge
Notary Public

Defendants' Exhibit "B"

IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL
CIRCUIT, IN AND FOR
GADSDEN COUNTY, FLORIDA

CASE NO.: 83-275-CA

CENTRAL BANK OF THE SOUTH,
a National Banking Association,

Plaintiff,

vs.

GISSENDANER MORTGAGE COMPANY,
et al.,

Defendant.

SECOND AMENDED ANSWER
DEFENSES AND COUNTERCLAIM

COMES NOW the Defendant and hereby amends the Amended Answer, Defenses and Counterclaim filed herein by inserting at the end of Second Affirmative Defense a new paragraph as follows:

"Since there is no evidence or probative matter to support the Judgment for Attorney's fee against Defendant Gissendaner Mortgage Company, nor under any

theory of law as against the individual Defendants, it would be a denial of due process of law to enforce an unfounded judgment and be in violation of the 14th Amendment of the United States Constitution as well as Section 9 of Article 1 of the Florida Constitution."

HAL A. DAVIS
7 W. Washingtin Street
Quincy, Florida 32351
904-627-7587

Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by United States mail to Mr. Stephen T. Etheredge, Post Office Box 1193, Dothan, Alabama 36302, this 14th day of March, 1984.

HAL A. DAVIS

A22

LAW OFFICES OF

JOHNSON, HUSKEY, HORNSBY & ETHEREDGE

131 NORTH OATES STREET

TELEPHONE (205) 793-3377

September 16, 1983

J. HUNELEY JOHNSON
DOW T. HUSKEY
ERNEST H. HORNSBY
STEPHEN T. ETHEREDGE*

CHERYL S. WOODRUFF
*Also admitted in Florida

Reply to:
P.O. Box 1193

Mr. Hal A. Davis
Attorney at Law
7 W. Washingtin Street
Quincy, Florida 32351

Re: Central Bank of the South v. Gissendaner Mortgage Company, el al

Dear Mr. Davis:

As I advised in correspondence of May 16, 1983, and subsequently in correspondence of June 8, 1983, Central Bank of the South has been actively engaged in soliciting the sales of the mortgages which were assigned by the Gissendaner's to secure the indebtedness which was subsequently the subject matter of litigation. To date, although various mortgage companies have been contacted, the best offer received for the purchase of the eight mortgages has been recieved from Mortgage Funding Corporation of Hattiesburg, Mississippi. Central Bank of the South has received an offer of

a total purchase price for these mortgages in the amount of $98,600.00. The sum of $98,600.00 represents the gross purchase price which will be reduced by the cost of closing.

You and your clients are hereby notified that it is the intention of Central Bank of the South to conclude the sale of the eight mortgages to Mortgage Funding Corporation prior to October 1, 1983. If your clients wish to match or better the gross purchase price offered by Mortgage Funding Corporation or if they are able to obtain a purchaser who is willing to purchase these mortgages for a larger purchase price, please advise me of their intentions not later than September 27, 1983. If we do not receive correspondence or communication from you or your client regarding this matter prior to the date indicated, we will proceed with the sale as proposed.

Sincerely,

S/Stephen T. Etheredge

Stephen T. Etheredge

STE/db

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA

FIRST DISTRICT

GISSENDANER MORTGAGE
COMPANY a partnership
comprised of J.C. GISSEN-
DANER, JACKSON M. GISSEN-
DANER and JOE C. GISSENDANER:
and J.C. GISSENDANER, indi-
vidually, and JACKSON M.
GISSENDANER, individually,
and JOE C. GISSENDANER,
individually,

Appellants,

vs. CASE NO.: BJ-171

CENTRAL BANK OF THE SOUTH,
A National Banking Association,

Appellee.

AMENDED MOTION FOR REHEARING
AND MOTION FOR REHEARING EN BANC

Counsel apologizes to this Honorable Court for failure to keep up with applicable law but in this instance a most important case bearing on this cause was inadvertently overlooked, hence this proffered amended motion.

The question before the Court is widespread in commercial transactions throughout this state and the country. It involves the requirements of a reasonably commercial sale of secured property upon default and ancillary thereto the remedies applicable to a commercially unreasonable sale.

Appellants previously submitted a Notice of Additional Authorities to the Court dated the 13th day of May, 1986, in which the Eleventh Circuit Court of Appeals held that a commercially unreasonable sale barred a deficiency judgment for the amount of the debt remaining unsatisfied after a commercially unreasonable sale. That ruling was based upon an assessment of the holdings of the various district courts of appeal in Florida. See Peoples Bank of Polk County v. Roberts, 779 F2d 1544.

It now appears that the Florida Supreme Court has settled that question differently from the Federal Court and, at least in one aspect, adverse to the Appellants position, in favor of that position.

In Weimer v. American Petrofina Marketing, Inc., 482 So2d 1362, the Supreme Court held that a commercially unreasonable sale did not bar a deficiency. It did however, lay down the burdens upon the respective parties in a suit for deficiency judgment.

That case arrived at the Supreme Court on a petition for review from the Fourth District Court of Appeal which court certified that its decision was in direct conflict with another district court's decision in Florida First National Bank vs. Martin, 449 So2d 861 which held that a commercially unreasonable sale barred a deficiency judgment.

In resolving the conflict and holding a deficiency judgment was available to the creditor reduced by the difference between the fair market value at the time of sale and the amount actually received, the court stated:

> "However, the secured party's failure to dispose of the collateral in a commercially reasonable manner should not impose a burden on the debtor to prove damages."
>
> "We therefore hold that when it has been determined that a secured party has disposed of collateral in a commercially unreasonable manner, there will arise a presumption that the fair market value of the collateral at the time of repossession was equal to the amount of the total debt that it secured. The burden to prove that the fair market value of the collateral was less than the debt will be upon the secured party."
>
> (emphasis supplied)

Here, the secured party never, al (sic)all, did anything to establish the value of the collateral at the time of repossession and therefore there is nothing to show the value of the collateral at that time.

The Affidavits of John Stack, and his deposition, are completely barren in that regard. Additionally, no market value was ever established and those material facts which might have been were rebutted by opposing Affidavits.

Respectfully submitted,

S/ Hal A. Davis
HAL A. DAVIS
7 W. Washingtin Street
Quincy, FL 32351
904-627-7587

Attorney for Appellants